Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

MARTHA J. WILLIAMSON, and Wiley Williamson,

Petitioners,

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY, a Torchmark Company, and Glynn Mott, Individually and as District Manager,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

There are two related questions in this case: if post-employment acts are, under the circumstances of this case, cognizable gender discrimination pursuant to Title VII of the Civil Rights Act of 1964, the Petitioners' second question is reached: whether those acts relate back as a matter of law to a charge not stating those facts.

1. The Court, in *Robinson v. Shell Oil Co.*,[1] using an analysis seemingly applicable to this case, has determined that post-employment actions, violating Title VII, are within the ambit of Section 704(a),[2] 42 U.S.C. § 2000e-3(a), as amended. In order to adhere to the principles stated by the *Robinson* Court, the question in this case is whether former employees are also within the ambit of § 703(a), 42 U.S.C. § 2000e-2(a), as amended.

2. Mrs. Williamson's charge before the EEOC did not state the post-employment facts she relies on to show that her charge was filed within 180 days of those events. The Fifth Circuit agreed per curiam with the district court's reasoning that there must be specific facts in the charge itself showing timeliness with which to link otherwise untimely facts. The issue therefore is whether a charge is timely where disparate treatment based on gender is clearly alleged but the specific facts demonstrating the charge's timeliness are only revealed after discovery during litigation. In

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[1] 117 S.Ct. 843, 136 L.Ed.2d 808 (1997).

[2] Throughout the Petition, Title VII will be referred to by its original section numbers. Like the federal securities acts, it is simpler to refer to the original section numbers.

QUESTION PRESENTED FOR REVIEW – Continued

other words, may facts, discovered in the context of later *litigation,* relate back to cause an otherwise time-barred *administrative* charge to be accorded timely status?

PARTIES

All parties appear in the caption. The parent corporation of the corporate Respondent and the corporate Respondent's affiliated entities are listed below, pursuant to Rule 29.6. For convenience, Petitioners will be referred to collectively as "Mrs. Williamson," and Respondents will be referred to collectively as "Liberty National."

Parent entity: Torchmark Corporation.

Other affiliates: American Life and Accident Insurance Company; First United American Life Insurance Company; Globe insurance Agency, Inc.; Globe Life and Accident Insurance Company; Living Decisions, Inc.; Torchmark Development Corporation; United American Insurance Company.

Other related entities: AE Energy, Inc.; Bellwether Exploration Company; Blackhawk Oil Company; Blackhawk Production Company; Brown-Service Funeral Homes Company, Inc.; Energy Assets International Corporation; Express Acquisition Company; Familco, Inc.; Family Service Life Insurance Company; Fiduciary Trust Company of New Hampshire; J. Gordon Gains of Texas, Inc.; L. Gordon Gaines, Inc.; Liberty Management Services, Inc.; Liberty National Auto Club, Inc.; Liberty National Fire Insurance Company; Liberty National GroupCare, Inc.; Liberty National Insurance Corporation; Liberty National Reinsurance Company, Ltd.; N.E. Financial, Inc.; Search Drilling Company; Sentinel American Life Insurance Co.; Sheffield Insurance Corporation; T.I. Financial, Inc.; Torch Energy Advisors, Inc.; Torch Energy Corporation; Torch Energy Marketing, Inc.; Torch Operating Company; TUP

PARTIES – Continued

Services, Inc.; Unicon Agency, Inc.; United Investors Equity Services, Inc.; United Investors Life Insurance Company; United Investors Management Company; United Investors Real Estate, Inc.; Vesta Insurance Corporation; Vesta Lloyds Insurance Company; W & R Insurance Agency, Inc.; W & R Insurance Agency of Alabama, Inc.; W & R Insurance Agency of Arkansas, Inc.; W & R Insurance Agency of Massachusetts, Inc.; W & R Insurance Agency of Montana, Inc.; W & R Insurance Agency of Nevada, Inc.; W & R Insurance Agency of Utah, Inc.; W & R Insurance Agency of Wyoming, Inc.; Waddell & Reed Asset Management Company; Waddell & Reed, Inc.; Waddell & Reed Investment Management Company; Waddell & Reed Leasing, Inc.; Waddell & Reed Services Company.

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit affirmed *per curiam* the district court's grant of Liberty National's motion for summary judgment, and the final judgment entered thereon. *Williamson v. Liberty Nat'l Life Ins. Co.*, 111 F.3d 893 (5th Cir. 1997) (not published pursuant to Local Rule 47.5). The district court's unpublished opinion was handed down on June 25, 1996.

While the case was pending before the Court of Appeals, this Court decided *Robinson v. Shell Oil Company*, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). Believing that the analysis announced by the Court in that case was at least persuasive authority relating to the principal question in this case, Mrs. Williamson filed her Rule 28(j) letter, Fed.R.App.P. The letter was dated March 19, 1997.

Subsequently, an order was entered by the Court, per Smith, J., stating that "the appellant's FRAP 28(j) letter filed **3/24/97** is accepted for filing (emphasis supplied)." This order was filed on April 2, 1997. Mrs. Williamson's FRAP 28 letter was received by the Clerk just four days before the panel's decision, entered March 28, 1997, and the order accepting it for filing was entered after the decision. Because of these events' timing, and the importance of the issues, Mrs. Williamson sought a hearing before the full court. The internal operating procedure of the Court of Appeals, promulgated pursuant to Rule 35, declares that Suggestions for Rehearing En Banc will be treated as a petition for rehearing by the panel if no Rule 40 petition is filed. The Court of Appeals, pursuant to its Local rule 35.3, requested a response from Liberty National sua sponte on April 11, 1997.

On May 14, 1996, the Court of Appeals, treating the suggestion for a hearing *en banc* as a petition for panel rehearing, denied the petition. Because no active member of the Court of Appeals requested a poll of that Court, the suggestion for rehearing *en banc* was denied.

The district court's opinion, the Court of Appeals' panel's decision, and the per curiam order denying both the petition for panel rehearing and the suggestion for rehearing are reproduced in the Appendix.

JURISDICTION

The Court has jurisdiction to consider a petition for certiorari in this case pursuant to 28 U.S.C. § 1254. Under the local rules and internal operating procedures, the Court of Appeals for the Fifth Circuit treats Rule 35 suggestions as Rule 40 petitions for panel rehearing. Consequently, this Petition is being filed within 90 days of that denial on May 14, 1997.

STATUTES INVOLVED IN THIS CASE

Section 703(a) of Title VII provides, in relevant part:

> It shall be an unlawful employment practice for an employer –
>
> . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex, or . . . to limit, segregate or classify his employees . . . in any way which would deprive or tend to deprive any individual

> of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . .

42 U.S.C. § 2000e-2(a), as amended.

Section 706 provides, in relevant part:

> A charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred. . . .

42 U.S.C. § 2000e-5(e)(1), as amended.

STATEMENT OF THE CASE

This case is about a series of events, known at all times to Mrs. Williamson, which may have a legal effect unrecognized by her until litigation commenced between the parties. Also, it may be candidly admitted, her trial counsel was also initially unaware of the potential legal relevance of these events until during litigation.

As for the Court's essential authority to hear the case, the Constitution of the United States provides the federal courts with original jurisdiction of cases arising under the laws of the United Stats, in this case, Title VII of the Civil Rights Act of 1964. U.S. CONST. art. III, § 2.

Turning to the facts, on April 13, 1994, Martha Williamson was fired from her employment as a sales agent for Liberty National by the District Manager, Glynn Mott, because she would not engage in sexual contact with Mott. Before 8:00 a.m. that morning, Mott called Mrs. Williamson into his office

> [a]nd when I went in his office and he asked me if I had made up my mind. I said made up my mind what? He said today is the day. Are you going to do – have sex with me or not? And I told him that it would be a cold day in hell when I had sex with him. And, I went to my desk and started doing my report. And he hollered for me. And Anita Bounds was my supervisor at the time. And he called me and Anita up to my – his office. And like I said, I was mad and – because of what he just said. So I just took my stapler and threw it on my desk and said, the son of a bitch. And when I got up there, he fired me. (R: 458)

Mrs. Williamson was forty-four (44) years of age. (R: 515) She had been employed by Liberty National since March 2, 1992. (R: 472) While signing her employment contract that day, Mott said " . . . sign this; and by signing this, as long as you stick with me, you will have a job with Liberty National." (R: 455)

The nature of this stickiness became apparent over time. While studying for a licensing examination during her first week in March, 1992, Mott hung around the room in the back of the office where she was studying and told her that if she passed the exam, he would take her out for a Margarita and a steak. Mott stated that after a couple of Margaritas " . . . you will be lots of fun." (R: 455) Mrs. Williamson reported this incident the next week to her then supervisor, Tommy Smith, who reassured her that "there ain't nothing to him". (R: 456)

Many mornings just after arriving at work, she had to go to Mott's office because he would yell for her over the loudspeaker which caused the people in her office to pick

on her about being "called on the carpet." (R: 456) The harassment's effects eventually wore on Mrs. Williamson: "It was just about an everyday thing. . . . I had got to where my – when I started to unlock the door to go in, my stomach was just in knots. And if – if I had done real good and sold a lot that week, I had to go to his office and get chewed out and asked to go to bed and all of this." Mott's episodes of "chewing out" when her sales were good began around November, 1993. (R: 458)

As irrational as this might seem for Mott, the person responsible for the district's sales, the point of it appears to have been to put Mrs. Williamson in a position where she could not refuse Mott's importunities. Mott's "deal," revealed by his actions, appears to have been that in return for sexual contact, Mrs. Williamson would have her lack of production, procured through Mott's harassment, disregarded or concealed.

Mrs. Williamson's testimony was substantially corroborated by her supervisors, Tommy Smith and Anita Bounds. They confirmed Mott's history of sexual harassment in the Meridian office. Bounds was aware that other female agents had complained about sexually harassing comments by Mott during her tenture as a sales agent and sales manager (R: 498, 503), and that the sexual comments and statements by Mott to female agents had been going on for several years before Mrs. Williamson became employed. (R: 501).

Tommy Smith stated that, with regard to complaints from workers on matters unrelated to the sale of insurance, he did not know of anything that the female agents complained of more than Mott's harassment (R: 486) and

that Mott continued to harass females in the office up until the day he left. (R: 484) Smith confirmed that the attitudes of the male managers in the office, upon learning of Mott's various sexually harassing statements, was one of dismissal; that his frequent verbal sexual innuendo was not to be taken seriously. (R: 488).

After Mott fired Mrs. Williamson on April 13, 1994, she received a letter dated June 6, 1994 from the Life Underwriter's Training Course ("LUTC"), notifying her that she had passed a particular licensing examination for a training course which Liberty National had required her to take. (R: 459, 472) As a matter of policy, Liberty National reimbursed its employees for the costs of taking the examination if the employee passed. (R: 472) She called the Meridian office regarding reimbursement and was referred to Mott who told her to bring the letter to his office. (R: 459, 472) Meeting with her a day or so later, he used the opportunity to make gloating sexual remarks and refused to reimburse her expenses. (R: 459, 472)

During the period from April 13, 1994 to June 23, 1994, that is, after Mrs. Williamson was terminated and while Mott was still a district manager. Mott harassed Mrs. Williamson by calling her at home and making sexual comments. (R: 463, 473) She reported the calls and the phone company placed a tracer on her telephone line. (R: 463, 466)

Following the incident with Mott regarding the LUTC reimbursement, Mrs. Williamson contacted Liberty National's home office in Birmingham, Alabama, about Mott's sexual harassment. She spoke with Mr. Newell Cheeseborough, Regional Vice President. (R: 472) Later,

she received a letter from Liberty National, dated July 12, 1994, offering her reinstatement with all benefits and back pay as though her employment had never been terminated. (R: 472, 476) Mrs. Williamson was reinstated in her position on July 18, 1994, with back pay and benefits; the termination was expunged from her personnel file. (R: 472, 473, 478-81)

According to Newell Cheeseborough, he had removed Mott as District Manager of the Meridian office in mid-June, 1994, for performance reasons (R: 778) and prior to hearing reports of Mott's sexual harassment. (R: 778, 771) According to Cheeseborough, at that time he offered Mott the opportunity to remain in the Meridian office as a sales agent or sales manager and told Mott to take a vacation and decide. (R: 766-767, 780)

After hearing the complaints, Cheeseborough and James D. Poole, General Counsel for Liberty National, met with Mott. (R: 781) They wished to play a shell game with him and move him to a sales position in Laurel, Mississippi. (R: 767-768, 782). Alternatively, he could retire. Mott chose the latter option. (R: 473, 504). Liberty National took no remedial action against Mott or within the Meridian office after his departure to alter the effects of his actions.

The damage to Mrs. Williamson, both professionally and personally, resulting from Mott's harassment of her was severe. By January, 1995, Mrs. Williamson was forced to take disability leave from Liberty National and was hospitalized for depression. (R: 472)

REASONS FOR GRANTING WRIT

I. THIS CASE INVOLVES ISSUES OF PARAMOUNT IMPORTANCE TO WORKING AMERICANS: DOES TITLE VII APPLY TO FORMER EMPLOYEES IN CASES NOT INVOLVING CLAIMS OF RETALIATION?

We begin with Rule 10: as a court whose jurisdiction is largely discretionary, only cases presenting issues of compelling public importance are heard. Probably the most cited reason for a grant of certiorari is a divergence amongst the several courts of appeals on an important federal issue.

Mrs. Williamson regards the Fifth Circuit's decision in this case as diverging from the decisions of other courts of appeals, with the exception of the Seventh Circuit, to have considered the issue raised in this case under § 703. Under the Fifth Circuit's local rule, unpublished decisions, as in this case, are merely persuasive authority for future cases. Local Rule 47.5.4. Mrs. Williamson believes that only a definitive statement from the Court will heal this nascent split. There should be no question by any district court or court of appeals that acts of prohibited discrimination, directed at "any individual," negatively affecting that person's employment opportunities, offend Title VII.

Aside from the seeming split among the courts of appeals, because this case presents the same question with respect to § 703 that the Court answered last term with respect to § 704 in *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997), there is an elegant symmetry which suggests that, in a proper case, the Court should

grant certiorari to expressly include prohibited acts committed against former employees within § 703(a).

In support of a grant of this writ of symmetry, Mrs. Williamson points out that the Court of Appeals affirmed the district court's grant of summary judgment against Mrs. Williamson based on the district court's careful explanation that "[a]side from the fact that plaintiff did not include this alleged conduct in her EEOC charge or in her complaint in this action . . . plaintiff's reliance on (the LUTC exam reimbursement incident) . . . is ill-founded for another reason: Title VII applies to employees, or at least prospective employees, and at the time of this alleged incident, plaintiff was not employed (or attempting to become employed) by Liberty National." (App. at 9)

If any of the alleged post-employment acts of Mott or Liberty National are cognizable pursuant to § 703(a), then the underpinnings of the district court's decision are swept away. Because of the enormous public importance of Title VII in the lives of working Americans, both symbolically and practically, review of the questions presented is worthy of the Court's attention.

II. AN APPARENT SPLIT OF AUTHORITY HAS RECENTLY DEVELOPED OVER WHETHER TITLE VII COVERS THOSE OUTSIDE AN EMPLOYMENT RELATIONSHIP WITH THE DEFENDANT.

Prior to this case, and one from the Seventh Circuit, the courts of appeals were in substantial unity that

§ 703(a) did not require a direct employment relationship between the plaintiff and defendant employer. The leading case on the issue is from the Court of Appeals for the District of Columbia Circuit, *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711 (D.C.Cir. 1978). Mrs. Shehadeh was employed by the defendant phone company for thirteen years before being terminated in 1968, apparently because she was pregnant. She applied for a job with a credit collections company in September of 1971. Shehadeh alleged that an employee of that company telephoned her and related that her former employer would cease doing business with the collection company if it hired her. She filed her first charge in January of 1973, based on the 1971 events and alleging gender discrimination. *Id.* at 715, 723-24.

The facts of Mrs Williamson's case closely parallel those of Mrs. Shehadeh's. Both filed "facially" untimely charges alleging acts of gender discrimination occurring over time. There, as here, proof of the conduct amounting to "a severe constriction of job-market access through distinctions outlawed by Title VII" bring the acts within Title VII, even where the actions are post-termination. *Id.* at 723.

In the January, 1973, charge, Shehadeh had alleged that the Chesapeake & Potomac Telephone Company had continuously foreclosed employment and listed one instance, that occurring in September of 1971. The District of Columbia Circuit "pierced the pleadings" to determine whether the charge was timely:

> We are mindful that appellant's January, 1973, charge cited but a single instance of interference with third-party employment. Nonetheless, it

> made plain that the specified event was illustrative of a long-lasting pattern of like events. . . . [T]he record lends substance to the inference that (Shehadeh) is endeavoring to challenge a persistent referencing policy. . . . In her deposition, she testified that between the date of her discharge and April, 1973, she obtained some 200 interviews. . . .

Id. at 725 (footnotes omitted).

In this case, Mrs. Williamson's charge made clear that there was a pattern and practice of gender discrimination which affected her. She alleged both "hostile environment" and "quid pro quo" events. It bears repeating that these are merely descriptive labels for disparate treatment based on gender. Doubtless Respondents will argue here, as below, that a "hostile work environment" claim necessarily means that a current employment relationship is presupposed. This is a form of *ad hominem;* argument by label.

Mrs. Williamson's deposition revealed post-employment acts which are also, allegedly, part of Liberty National's pattern and practice of discrimination. Shehadeh was allegedly terminated because of her pregnancy. Different events later allegedly curtailed her access to employment.

Mrs. Williamson alleges different events, both pre- and post-termination, but which all result from the same discriminatory animus. The *Shehadeh* Court concluded that § 703(a) included former employees:

> Moreover, Title VII provides for the filing of administrative charges and subsequent institution of civil actions by "persons aggrieved," and

> in determining aggrievement, reference is to be made to "the standing concepts articulated by the Supreme Court as 'injury in fact' and an interest 'within the zone of those regulated by the statute or constitutional guarantee in question.' " Thus, "[t]he fact that the Act purports to provide remedies for a class broader than direct employees is a strong indication that the proscriptions contemplated by Section 703(a)(1) reach beyond the immediate employment relationship."

Id. at 721, fn. 50 (internal citations omitted).

The court went on to say that even if some direct employment relationship is required by Title VII, under the facts before it, that employment "nexus" was met by the past employment relationship. *Id.* Here, as in *Shehadeh,* acts are alleged which tended to, and ultimately did, affect Mrs. Williamson's prospective employment. That allegedly bad employment recommendations curtailed Shehadeh's employment opportunities while in this case Mrs. Williamson's prospects were affected by the physical and emotional illness resulting from the harassment is analytically irrelevant. Section 703(a) proscribes discrimination based on gender which "would deprive or tend to deprive any individual of employment opportunities. . . ."

Mott held post-termination audience with Mrs. Williamson to consider whether she should be reimbursed for successfully passing a professional examination. Based on the testimony so far, Liberty National's policy of reimbursing employees who pass can be seen as a privilege of employment with that company. A post-termination denial of that privilege nevertheless affects a privilege earned by virtue of employment.

The view that § 703(a) encompasses prohibited acts against those having no direct employment relationship enjoys a large, but not unanimous, acceptance among the courts of appeals. For example, *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C.Cir. 1973), involved a private duty nurse who obtained employment from individual patients while hospitalized in Sibley Memorial. The procedure was to call upon a registry service which matched the patient's request with a nurse available for duty at the time requested. Wilson alleged that, even though he was not employed by the hospital, it engaged in invidious discrimination by refusing to refer him to female patients. *Id.* at 1339-40.

The court determined that the hospital was a covered employer under § 701, and that based on the policy of the act to achieve the equality of employment opportunities, the lack of a direct employment relationship between the defendant and plaintiff was irrelevant.

> To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

Id. at 1341.

The *Sibley* Court turned to the language of § 703(a) for guidance on whether actions taken outside an employment relationship were cognizable discrimination. The court noted that "any individual" could easily encompass former employees, applicants, current

employees, or anyone else. The court also observed that the statute, in providing for administrative and judicial process, uses the term "person aggrieved" to mean any person aggrieved by any of the forbidden practices. That term, said the court, could easily comprehend those having no direct employment relationship. *Id.* at 1341.

Consequently, the court held that the hospital could be liable for committing forbidden acts of gender discrimination even without a direct employment relationship. Several other courts also have held that any employer who affects, through forbidden discriminatory acts, the access of "any individual" to employment opportunities, whether or not the individual is employed by the defendant employer, still falls within the purview of Title VII: *Charlton v. Paramus Board of Educ.*, 25 F.3d 194 (3d Cir.), *cert. den.*, 513 U.S. 1022 (1994) (§ 703 may apply where no employment relationship exists between plaintiff and defendant stated in dicta); *Zaklama v. Mt. Sinai Medical Center*, 842 F.2d 291 (11th Cir. 1988); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223, 103 S.Ct. 3565, 77 L.Ed.2d 1406 (1983); *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019 (9th Cir. 1983).

Recently, the Seventh Circuit broke ranks with at least part of this analysis, in *Alexander v. Rush North Shore Medical Center*, 101 F.3d 487 (7th Cir. 1997). Just as the Fifth Circuit rejected applying § 703 to one not having an employment relationship with the defendant, at least under the facts of this case, so, too, did the Seventh Circuit in *Alexander*. There is a factual difference between this case and *Alexander*, however. In this case, there was no employment relationship at the time of the failure to

reimburse and other post-termination acts. But Mrs. Williamson had at least been employed at one time by the defendant.

Dr. Alexander, conversely, was a self-employed anesthesiologist with staff privileges at Rush. A condition of keeping his privileges was being on-call for the hospital's emergency room during specified times. Without being able to treat patients in a hospital, where anesthesiologists usually practice in operating rooms, the Seventh Circuit recognized that Dr. Alexander's economic prospects would be diminished.

The hospital withdrew his privileges when he failed to promptly answer a call; the court, however, did not reach the rather confusing merits. The Seventh Circuit concluded that Dr. Alexander was an independent contractor both with respect to the hospital and with respect to his patients. That court used a familiar common-law multi-factor control test to make this determination. *Id.* at 492. Consequently, the court reasoned, while his economic prospects were dimmed, his employment opportunities were not affected even assuming that the hospital's action was discriminatory. *Id.*

The court said, "a plaintiff 'must prove the existence of an employment relationship in order to maintain a Title VII action against [the defendant],' and that 'independent contractors are not protected by Title VII.' " *Id.* at 492, *quoting Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 380 (7th Cir. 1991). Again, Mrs. Williamson was neither an independent contractor nor employee at the time of the alleged post-termination events.

There are several reasons to ruminate on *Alexander*. The quoted text above indicates that its analysis cannot be relegated just to independent contractors. However, the *Alexander* Court did attempt to limit its holding:

> It is important to note that our ruling today is limited to overturning (*Doe v. St. Joseph's Hosp.*, 788 F.2d 411 (7th Cir. 1986)). We have no occasion to go further and determine if a Title VII plaintiff must always demonstrate that he is an employee *of the defendant employer*. Thus, we continue to leave open the question that went unanswered in *Shrock*, 810 F.2d at 660 – *i.e.*, whether an employee of employer *X* may bring a Title VII action against employer *Y* when *Y* is not his employer, but merely someone whose discriminatory conduct interferes with his employment with employer *X*.

Id. at 493-94, fn. 2 (emphasis in original).

The *Alexander* Court either ignored the possibility, or decided *sub silentio* in the negative, that self-employment may be a kind of employment relationship within the purview of Title VII, despite its admonitory footnote. The purpose here is not to answer this question. The point is that the analytic framework of the Seventh Circuit in *Alexander*, and the Fifth Circuit's agreement with the analysis of the district court in this case, cannot draw normative differences among those plaintiffs with no employment relationship with the defendant.

Whether one is an "independent contractor" or an out-of-work former employee, there is no employment relationship or opportunities to adversely affect under these analyses. The District of Columbia Circuit's idea of

a necessary nexus between an individual and a covered employer to delimit the reach of § 703 may have merit as a possible genesis for such a normative analysis. For the purposes of this Petition, however, the point is that this is a question of great public importance, and with a growing split in the courts of appeals, the Court should determine whether plaintiffs who are at least former employees may nevertheless still state a claim under § 703(a).

III. THE COURT IN *ROBINSON* HELD THAT § 704'S USE OF THE TERM "EMPLOYEE" INCLUDED THOSE HAVING A FORMER EMPLOYMENT RELATIONSHIP WITH THE DEFENDANT AND SHOULD NOW TAKE THE OPPORTUNITY TO SO DECLARE THAT § 703'S USE OF "ANY INDIVIDUAL" AND "EMPLOYEE" ALSO ENCOMPASSES FORMER EMPLOYEES.

Robinson involved a statutory construction of § 704(a). This case involves disparate treatment based on gender pursuant to § 703(a). There is no reason to believe that statutory construction of the word, "employee," should vary significantly between these sections. *Robinson* involved the firing of Charles Robinson by Shell Oil in 1991. He filed a charge alleging race discrimination with the EEOC. Subsequently, Robinson applied for work with another company. That company inquired at Shell Oil for an employment reference. Allegedly, that reference was negative and done for the purpose of retaliating for Robinson's earlier EEOC filing. Robinson sued claiming retaliatory discrimination under § 704(a).

The Supreme Court granted certiorari to consider the question whether the term "employees," as used in § 704(a), "includes former employees, such that petitioner may bring suit against his former employer for post-employment actions allegedly taken in retaliation for petitioner's having filed a charge. . . . " *Id.* at 845. The Court noted that "at first blush," the word "employee" appears to imply a present employment relationship between the plaintiff and defendant. *Id.* at 846.

The Court rejected so facile an interpretation because there was no temporal qualifier within the statute to plainly express the limits of its protection. Observing that the statute used neither "former" nor "present" and that Congress had used "employee" to mean former employees or only present employees in other provisions of Title VII "proves only that Congress can use the unqualified term "employees" to refer only to current employees, not that it did so in this particular statute." *Id.* at 846. The Court then turned to the definition section of Title VII. Section 701 uses a rather circular definition of "employee": "an individual employed by an employer." Again, the Court found no temporal qualifier.

Third, the Court looked at other parts of Title VII, noting that § 706 calls for reinstatement or hiring as available remedies. Since one cannot "reinstate" current employees, nor "hire" current employees, the term necessarily may have broader application. *Id.* at 847. All of which, concluded the Court, merely demonstrates that the term "employees" can have a plain and unambiguous meaning in some sections, but not that it has the same

meaning in all sections. Hence, where the term is susceptible of different meanings in various sections, standing alone it becomes ambiguous.

Finally, the Court turned to the presence of the term "individual" in § 704(a). Noting that it also appears in § 703(a), the Court said that it

> provides no meaningful assistance in resolving this case. To be sure, "individual" is a broader term than "employee" and would facially seem to cover a former employee. But it would also encompass a present employee as well as other persons who have never had an employment relationship with the employer at issue. The term "individual," therefore, does not seem designed to capture former employees, as distinct from current employees, and its use provides no insight into whether the term "employees" is limited only to current employees.

Id. at 848. The Court turned to the "broader context" of Title VII to resolve the ambiguity.

The Court noted that § 703(a) expressly includes "discharge" as an unlawful employment practice. A charge under § 703(a) alleging unlawful discharge is necessarily made by a former employee. The Court observed that § 704(a) protects employees, as unlawful retaliation, from employment decisions based on filing a charge under § 703(a). Hence, the Court concluded that the statutory construct compels the conclusion that "employees" includes former employees. In further support for this construction, the Court looked at underlying policy.

Excluding former employees from the ambit of § 704(a) would undermine Title VII by allowing the threat of post-employment acts to deter victims of discrimination from complaining to EEOC. Not including former employees within § 704(a)'s protection would undermine access to statutory remedial provisions. Thus, since it is more consistent with the "broader context" of Title VII and its underlying policy, the Court held that, as used in § 704(a), the term "employee" includes former employees.

Applying this analysis here, § 703(a), as mentioned by the Court in *Robinson*, uses language similar to § 704(a):

> It shall be an unlawful employment practice for an employer – . . . to discriminate against *any individual* with respect to his compensation, terms, conditions, or *privileges of employment*, because of such individual's . . . sex, or . . . to limit, segregate or classify *his employees* . . . in any way which would *deprive or tend to deprive any individual of employment opportunities* . . . because of such individual's . . . sex. . . . "

42 U.S.C. § 2000e-2(a) (emphasis supplied). Like § 704(a), this section has no express temporal modifiers unambiguously suggesting that it does not also protect "former employees" within either statutory category of "individual" or "employee."

Nor is the context clear: there are no references, for example, to reinstatement, hiring, salary, or promotions suggesting a temporal qualification. Hence, as in § 704(a), the term "employee" standing alone merely becomes

ambiguous. As directed by *Robinson*, the underlying policies, the "broader context," of the statute must be considered.

Analogous to § 704(a), § 703(a) fundamentally protects "individuals" and "employees" from gender-based discrimination affecting the conditions and privileges of employment and the equal access to employment opportunity. As the Supreme Court has held in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), disparate treatment on the basis of gender need not lead to emotional trauma in order to be actionable. Needless to say, the *Harris* Court was also quick to say that especially egregious examples of emotional and psychological destruction were well within the boundaries of Title VII. *Id.* at ___, 114 S.Ct. at 371.

In this case, Martha Williamson's work environment was " 'so heavily polluted with discrimination as to destroy completely (her) emotional and psychological stability (internal citation omitted).' " *Id.* at ___, 114 S.Ct. at 371, *quoting Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986). There can be fewer obvious means of affecting the privileges of employment and the deprivation of employment opportunities than acts leading up to hospitalization of an employee. Because § 703(a) should also include "former employees," Mott's actions following Mrs. Williamson's termination, following his well-established pattern of abuse, are also cognizable as discrimination against Mrs. Williamson's "privileges of employment" which also "tend(ed) to deprive *any individual of employment opportunities*" because of such individual's gender.

IV. FACTS BROUGHT TO LIGHT AFTER THE EEOC'S PROCEEDINGS END SHOULD RELATE BACK TO THE CHARGE WHERE THE LATER-REVEALED FACTS ARISE FROM THE SAME OPERATIVE FACTS DEMONSTRATING GENDER DISCRIMINATION.

There is no point in not candidly stating that this Petition is an attempt to rescue a case from the limitations period. There is neither legal nor moral shame in that, however. The question is whether the case can be "rescued" within the terms of the statute. Neither Mrs. Williamson, nor Mr. Smith, her trial counsel, realized until after the charge was filed the potential legal significance of Mott's post-termination conduct. They, as did the district court, had a knee-jerk reaction that Title VII only applies to those with a direct employment relationship.

There is also no point in evading the fact that both Smith and Williamson initially believed that the charge was facially timely. While Williamson was fired on the thirteenth, her last day of work was the fifteenth. Hence the two days now so crucial to her case.

Those sophisticated in the nuances of Title VII recognize these two days as a *Ricks*[3] issue. For whatever it's worth, the district court seemed equally confused as to why Williamson stated the discriminatory event in her charge as having occurred on April 15, 1994, while the later complaint listed April 13, 1994. (App. at 8, fn. 2). The discriminatory occurrence is not the last day of work, but the time of the actual firing.

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[3] *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

With respect to whether facts not mentioned in the charge, but which are, or would have been, later discovered may be "timely" within the 180 day period, is a question that has already received two similar answers from the courts of appeals. In *Shehadeh, supra,* the case factually similar to this one, a charge stating only facts which made the filing untimely were linked with later facts falling within 180 days of the filing to show that the charge was "filed within 180 days after the alleged unlawful employment practice."

In *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1971), the Fifth Circuit held that facts which would otherwise be untimely, may relate back to an earlier charge which was timely. While it hurts to say so, there is no express authority in Title VII for the results reached in either *Sanchez* or *Shehadeh.*

The district court in this case, with its reasoning adopted by reference by the Fifth Circuit, held that *Sanchez* and its progeny stood for the proposition that "not only must there have been an incident within the 180 days preceding her charge, . . . she must have filed a timely charge with respect to such incident. (citation omitted) Otherwise, there is no timely charge to anchor the other, prior incidents that would otherwise be time-barred." (App. at 15)

While the district court got the *Sanchez* rule exactly reversed, the facts in *Sanchez* were that a timely charge of gender discrimination had been filed. Later, Ms. Sanchez wished to amend her charge to include national origin, but the then-90 day period had run. She later received a

right-to-sue letter and filed suit claiming race, color, and national origin discrimination.

Standard Brands objected that these latter claims were not contained in any timely charge before the EEOC and, therefore, were time-barred. *Id.* at 460. The Fifth Circuit noted that the statute requires filing a charge of discrimination within the stated time period. Beyond this, the Fifth Circuit lamented, Title VII left much to be desired in terms of procedural clarity.

For part of its analysis, the Fifth Circuit relied on the Commission's relation-back rule, similar to Rule 15, Fed.R.Civ.P., now found at 29 C.F.R. § 1601.12(b). No amended charge was ever filed in this case. Doubtless, the better procedure would have been to have done so. However, as in *Sanchez*, Mrs. Williamson sought to raise factual allegations not contained in her charge.

Standard Brands objected that Ms. Sanchez's new factual allegations were in neither her original nor amended charge and were, therefore, time-barred. *Id.* at 461. The Fifth Circuit noted that, as a matter of policy, it was loathe to allow procedural technicalities to stand in the way of a court's giving effect to "the remedial and humanitarian underpinnings of Title VII and the crucial role played by the private litigant. . . . " *Id.* at 460.

The "procedural ambiguity" to which the *Sanchez* Court referred was the statute's near silence as to the requirements of the "charge." Section 706 provides that a charge must be made by an aggrieved party, in writing, under oath, and filed within 180 days after the alleged unlawful practice. The statute does not necessarily require that the charge, the piece of paper filed with the

EEOC, state all facts relating to the discriminatory conduct. The EEOC's regulations applicable to this case, like the Rules of Civil Procedure, provide for "notice pleadings." See, 29 C.F.R. § 1601.6 *et seq.*

The regulations provide that a charge is filed when the Commission receives a written statement identifying the parties and the acts or practices complained of. Also similar to the Rules of Civil Procedure, the regulations allow liberal amendment. 29 C.F.R. § 1601.12. Mrs. Williamson filed her charge on the EEOC's form. (R: 515) She checked the "sex" box, relating to the discriminatory events, filed in the date section with "earliest" being March 6, 1992, and latest being April 15, 1994. In the written particulars, Mrs. Williamson indicated that the gender-based mistreatment continued over a period of "several months" with the last incident being Mott's demand that she have sex with him, which negative response earned her dismissal, effective on April 15, 1994.

So, the question never before dealt with by this Court is whether a "charge" is an EEOC form which must state with particularity all facts later relied upon in federal litigation, or whether facts discovered either during the EEOC investigation or during later litigation, may relate back to an original charge, whether to show timeliness or additional issues to be litigated.

Under the *Sanchez* rule, the scope of judicial proceedings is limited by the information contained in the charge and

> discrimination like or related to allegations contained in the charge and growing out of such allegation during the pendency of the case

> before the Commission. (citation omitted) In other words, the "scope" of the judicial complaint is limited to the "scope" of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.

Id. at 466 (internal quotation omitted). As the district court consistently noted, Mrs. Williamson's allegations concerning Mott's post-termination actions appeared in her deposition. (App. at 8-9, 11) These facts would seem to be exactly those which would have grown from any EEOC investigations.

Mrs. Williamson did state, under oath, that the last act of discrimination was when Mott fired her. Both of these are instances of incorrect legal conclusions attached to factual allegations. "Binding" Mrs. Williamson to her own uninformed legal conclusions, and factual statements made based on those legal conclusions, is so obviously improper that little discussion is necessary. A claimant is not bound by technical pleading defects, but by the notice provided in the charge and the reasonable scope of an investigation which would have followed.

The reason for this is that the EEOC charge is not filed as a preliminary to a lawsuit. Rather, the purpose of a charge is notice to both the EEOC and to the respondent of the nature of the allegations and to trigger an investigation. *Id.* The Court, in a different context, has endorsed this concept. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68, 104 S.Ct. 1621, 1631, 80 L.Ed.2d 41 (1984).

The *Sanchez* Court noted that "it is irrelevant whether Celia Sanchez is educated or uneducated. The point is

that *some* charging parties are uneducated and inarticulate, and the procedural rules we develop in this case and in others must be sufficiently liberal to protect their rights." *Sanchez*, 431 F.2d at 463 (emphasis in original). Similarly, the question in this case is not whether Mrs. Williamson's charge was prepared by, or with the advice of, an attorney. It is simply irrelevant whether an attorney's legal conclusions were correct or not concerning the definition of a present act of discrimination and whether the acts link together into a pattern and practice of continuing gender discrimination.

Under *Sanchez* and its progeny[4], whether Mrs. Williamson's charge was timely filed necessarily depends on the facts alleged and the facts a reasonable investigation would have revealed. The facts which would have been revealed by an investigation are stated by Mrs. Williamson in her deposition: Mrs. Williamson has specifically pointed to two acts, both within the 180 day period, which she believes are within the terms of the law.

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[4] The courts of appeals are in substantial agreement that the scope of the complaint is not limited to the charge. Facts discovered later may relate back to the original charge as a matter of law. Additional facts and allegations may be stated in a lawsuit so long as the discrimination is similar or reasonably related to the allegations in the charge and growing out of such allegations. See e.g., *Gomes v. Avco Corp.*, 964 F.2d 1330 (2d Cir. 1992); *EEOC v. Rhone-Poulenc, Inc.*, 876 F.2d 16 (3d Cir. 1989); *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992); *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989); *Tart v. Hill Behan Lumber Co.*, 31 F.3d 668 (8th Cir. 1994); *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569 (9th Cir. 1973).

First, Mott forced her to return to Liberty National's offices on the pretext of reimbursing her examination expenses, but actually to inflict additional harm, which deprived her of a privilege of employment, reimbursement, which had earlier vested. In addition, Mott's alleged acts not only tended to, but ultimately did, adversely affect her employment opportunities. Second, Liberty National failed to take any remedial measures to neutralize the effects of Mott's years of service. These alleged acts are "discriminat(ion) against any individual with respect to . . . privileges of employment, because of such individual's . . . sex, or . . . to classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . sex. . . . "

Also, Mrs. Williamson could not have become aware of Liberty National's failure to take remedial action against Mott until Smith and Bounds, her supervisors, and Newell Cheesborough and Glynn Mott were deposed. Smith, particularly, was clear that Liberty National had done nothing to remedy the specific gender discrimination practiced upon Mrs. Williamson. Cheesborough and Mott testified about Liberty National's desire to remove him quietly from the scene. Because this case was decided on a motion for summary judgment, how was the district court able to conclude that these actions and omissions were sufficient remedial measures? That decision, based on the evidence adduced, should have been for the fact finder. All know that a failure to take remedial measures for violations of Title VII is itself a violation of Title VII. *Waltman v. International Paper Co.*,

875 F.2d 468 (5th Cir. 1989) (what is appropriate remedial measure depends on facts of a particular case).

The problem of later-discovered facts, or facts later realized to have legal import, is not unique to this case. The problem is how much "give in the gears" Title VII permits with respect to the initial charge. As pointed out above, the federal courts for years have been allowing a kind of relation back of later discovered facts. Because Title VII cases are proceedings begun in a different forum than a court, the courts of appeals have recognized the futility in requiring in every instance an amended charge.

The administrative procedure in many cases is like that here: a perfunctory administrative process resulting in no real investigation with a right-to-sue letter issued routinely. If the district court was correct that the charge was a preliminary act to this suit, then should not the district court have either remanded the case to the EEOC or dismissed it without prejudice to allow Mrs. Williamson to amend her charge before the EEOC? The policies underlying Title VII, employment opportunity absent discrimination, would seem best served by recognizing, as this Court has, that the charge is not a preliminary to a lawsuit.

So long as the charge functions as notice of the discrimination alleged by the complainant, the policies underlying the statutory limitations period would seem to be met. Limitations periods are to protect defendants from stale claims which would place the defendant at a disadvantage in finding witnesses or other evidence with which to defend. The Court shou'd adopt a liberal rule, as suggested by *Sanchez* and *Shehadeh*, recognizing that some

leeway must be allowed to accommodate the practical exigencies of proceedings begun in one forum and then taken up in a federal court.

Where a defendant has had notice from the beginning that the plaintiff is trying to enforce a claim based on noticed conduct, the reasons for the statute of limitations do not exist. To adopt any other rule does not recognize the legitimate scope of a limitations provision, but subjects claimants to possible defeat at the hands of a pleading technicality before an administrative body, not even a court.

V. CONCLUSION

The Court should accept this case to prevent further erosion of Title VII's protections. The Court should endorse the view, long held by the Fifth Circuit but effectively abandoned in this case, that lawsuits are not precluded by mere technical pleading defects in an administrative filing.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60658

MARTHA J. WILLIAMSON; WILEY WILLIAMSON

Plaintiffs - Appellants

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY, A Torchmark Company; GLYNN MOTT, Individually and as District Manager

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

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(Opinion 3/28/97, 5 Cir., ___, ___ F.3d ___)

(Filed May 14, 1997)

Before SMITH, DUHE, and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is Denied.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60658
Summary Calendar

MARTHA J. WILLIAMSON
and
WILEY WILLIAMSON,

Plaintiffs-Appellants,

VERSUS

LIBERTY NATIONAL LIFE INSURANCE COMPANY
and
GLYNN MOTT,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(4:95-CV-92-LN)

(Filed Mar. 28, 1997)

Before SMITH, DUHE, and BARKSDALE, Circuit Judges.

PER CURIAM:*

The plaintiffs allege a violation of title VII and assert various state causes of action stemming from Martha Williamson's discharge from employment by Liberty

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

National Life Insurance Company. The district court granted summary judgment on the title VII claim because Martha Williamson did not file her EEOC charge within 180 days, as required by the statute. The court dismissed the state claims without prejudice.

In its comprehensive, 21-page Memorandum Opinion and Order filed on June 25, 1996, the district court carefully explained why it concluded that the 180-day requirement was not satisfied. We agree with the court's reasoning and affirm on the basis of its persuasive opinion.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MARTHA J. WILLIAMSON AND
WILEY WILLIAMSON — PLAINTIFFS

VS. — NO. 4:95CV92LN

LIBERTY NATIONAL LIFE INSURANCE COMPANY, A TORCHMARK COMPANY, AND MR. GLYNN MOTT, A DISTRICT MANAGER, AND GLYNN MOTT, INDIVIDUALLY — DEFENDNATS (sic)

MEMORANDUM OPINION AND ORDER

(Filed Jun. 25, 1996)

This cause is before the court on the motion of defendant Liberty National Life Insurance Company (Liberty National) and Glynn Mott to dismiss or, alternatively, for summary judgment. Plaintiffs Martha J. Williamson and Wiley Williamson have responded to the motion and the court, having considered the memoranda of authorities, together with attachments, submitted by the parties, concludes that defendants' motion should be granted in part and denied in part as set forth herein.

Martha Williamson was hired by Liberty National as an insurance sales agent at its Meridian, Mississippi district office on March 2, 1992. Her immediate supervisor was Glynn Mott, a Liberty National district manager. Plaintiffs charge in this action that Mott, from the beginning of Ms. Williamson's employment in 1992 made persistent, repeated unwanted sexual advances to her until finally, on April 13, 1992, issued her an ultimatum: have

sex with him or be fired. When Ms. Williamson refused, Mott terminated her employment, ostensibly for her lack of production in her work. Thereafter, following communications with management personnel in Liberty National's home office concerning her allegations about Mott's conduct, Mott "chose" to resign his position with Liberty National and on July 18, 1994, Ms. Williamson was reinstated to her former position.

On October 12, 1994, Ms. Williamson filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that she had been the victim of sexual harrassment (sic) by Mott. Upon her receipt of the EEOC's notice of right to sue, Ms. Williamson filed her complaint in the present action on June 19, 1995 against Liberty National and Mott, alleging sexual harassment in violation of Title VII of the Civil Rights of 1964 (sic), 42 U.S.C. § 2000e *et seq.*, and state law claims for wrongful discharge, intentional and/or negligent infliction of emotional distress and defamation. Additionally, her husband, Wiley Williamson, alleged a claim for loss of consortium. Defendants Liberty National and Mott seek summary judgment on each of plaintiffs' claims.

In count one of her complaint, styled "quid pro quo and hostile work environment sexual harassment under 42 U.S.C., Sections 2000e, *et seq.*," Ms. Williamson charges that throughout her employment by Liberty National, she was repeatedly subjected to unwelcome sexual harassment by Mott which Liberty National "knowingly condoned and/or otherwise ignored." Defendants submit in their motion for summary judgment that plaintiff's cause of action under Title VII is due to be dismissed for Ms.

Willimson's (sic) failure to timely file an administrative charge with the EEOC. The court agrees.

Title VII requires that a person claiming discrimination file a charge with the EEOC within 180 days after the allegedly discriminatory practice occurs. 42 U.S.C. § 2000e-5(e)(1) ("A charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred . . . ."). The timely filing of such an administrative charge with the EEOC is a prerequisite to the filing of a lawsuit in federal court under Title VII. *Dollis v. Rubin*, 77 F.3d 777 (5th Cir. 1995). In determining when the 180-day filing period commences to run, the focus is on the time of the discriminatory acts. *Delaware State College v. Ricks*, 449 U.S. 250, 258 ((1980) (sic). Again, plaintiff in the case at bar filed her EEOC charge at the earliest, on October 12, 1994.[1] Defendants assert that because the last discriminatory act alleged by Ms. Williamson occurred on April 13, 1994, then to have been timely, her EEOC charge was required to have been filed no later than October 10, 1994. Since it was not, defendants maintain that her Title VII claim must be dismissed.

In response to defendants' motion on this point, Ms. Williamson argues first, that her Title VII claim is not time barred as "numerous incidents" of harassment occurred after April 13, and within the 180-day limitations period. Alternatively, she states that even if the last incident of discrimination occurred on April 13, 1994,

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[1] According to the EEOC's records, though it did not receive the "hard copy" of Ms. Williamson's charge until October 17, 1994, it received a copy of Ms. Williamson's charge by telefax on October 12, 1994.

there exists a continuing practice on the part of Liberty National of condoning a hostile work environment and quid pro quo sexual harassment which precludes dismissal of her Title VII claim. And finally, alternatively, she asserts that the limitations period should be equitably tolled. In the court's opinion, none of plaintiff's arguments has merit.

In count one of her complaint in this cause, Ms. Williamson has alleged that the harassment to which she was subjected by Mott continued through her termination from employment on April 13, 1994; no discriminatory acts are alleged to have occurred past that date. Moreover, in her EEOC charge, plaintiff consistently identified the date of her termination by Mott as the last act of discrimination.[2] In the box on her charge form requesting information on when the discrimination occurred, plaintiff identified the "latest" date on which "discrimination took place" as "4/[13]/94." And in her response to the request for "the particulars" of her claim, she explicitly stated, "The last incident was when he asked me if 'I had come to a decision about whether or not I would have sex with him[.]' I told him no and he then responded by firing me, effective April [13], 1994."

In her deposition, taken in February 1996, Ms. Williamson did testify that further incidents of harassment

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[2] There has been some confusion as to when the termination occurred. In her complaint, filings with the Mississippi Employment Security Commission and deposition testimony, plaintiff identified the date as April 13, 1994. In her EEOC charge, however, she stated that she was terminated on April 15, 1994. Plaintiff has now clarified that the date of that act was, in fact April 13, rather than April 15, 1994.

occurred after her termination by Mott and after Mott's resignation from Liberty National. In fact, according to Ms. Williamson, Mott "stalked" her and harassed her for months thereafter, up through January 1995. But ultimately, she agreed that "any other incidents [of harassment] that took place were either after [she] had been fired or when Glynn Mott was no longer working for Liberty National."

One of the "numerous incidents" of post-termination harassment described by plaintiff in response to defendants' motion occurred in early June 1994 when, at Mott's direction, she went to his office to obtain reimbursement of costs which she had incurred in taking a particular licensing examination at the behest of Liberty National. She maintains that at her meeting with Mott to discuss the matter, he berated and harassed her, telling her that if she had agreed to have sex with him, she would still be employed and would be getting her money. Aside from the fact that plaintiff did not include this alleged conduct in her EEOC charge or in her complaint in this action as a part of her Title VII claim, plaintiff's reliance on this incident in an attempt to demonstrate the timeliness of her EEOC charge is ill-founded for another reason: Title VII applies to employees, or at least prospective employees, and at the time of this alleged incident, plaintiff was not employed (or attempting to become employed) by Liberty National.[3] Plaintiff argues that while as a "technical matter," she may not have been Liberty National's employee at that time, to deny her to

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[3] Plaintiff's suggestion to the court that she could be considered a prospective employee at the time of this alleged incident is disingenuous at best.

protection of Title VII on that basis would be to elevate form over substance, given that she went to Mott's office on that occasion at his request and on a matter of company business. Nevertheless, as she was not employeed (sic) by the company when this alleged harassment occurred, it cannot provide the basis of a claim under Title VII and thus cannot provide a basis for extending the date of the commencement of the limitations period.[4]

Plaintiff next argues that even if the June incident cannot be counted for limitations purposes, nevertheless, when she did return to work in July 1994 and at a time when Mott was still with Liberty National, Mott continued to harass her. Based on the evidence presented by the parties (and again, apart from any consideration of the fact that plaintiff included no such allegation in her EEOC charge or complaint or amended complaint in this cause), this argument, too, must fail.

On this subject, the evidence shows that Ms. Williamson, following her termination by Mott on April 13, communicated her allegations of sexual harassment by Mott to Liberty National's regional vice president, Newell Cheeseborough. Thereafter, on July 12, she received a letter from Liberty National advising that the "concerns" she had raised "ha[d] all been addressed by the Company," and offering her unconditional reinstatement to her former position. That correspondence was followed by a letter to Ms. Williamson's attorney dated July 14,

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[4] Plaintiff also contends that since Liberty National later reinstated her as though her employment had never ended, then she was an employee of Liberty National at the time Mott harassed her in June. This contention is patently without merit.

1994, advising that, "[a]s you probably know, Glynn Mott is no longer employed in the Meridian office in any capacity." Ms. Williamson therefore accepted Liberty National's offer and returned to work on July 18, 1994, receiving backpay and benefits as though there had been no interruption in her employment.

In the meantime, according to uncontroverted deposition testimony of both Mott and Cheeseborough, as well as an affidavit submitted by Cheeseborough, around the time that plaintiff's allegations of sexual harrassment (sic) came to light in late June, Mott had already been relieved of his duties as district manager for the Meridian office on June 23, 1994, placed on administrative leave and never returned to work for the company. Apparently, he was offered the opportunity to transfer to Liberty National's Laurel, Mississippi office, but about July 11, he declined the offer and chose to resign instead, effective July 29, 1994.

The court reiterates that plaintiff, in her deposition testimony, did describe incidents of harassment post-dating her return to Liberty National's employment in July 1994. However, she explicitly agreed that following her termination by Mott, "any incidents [of harassment] that took place were either after [she] had been fired or when Glynn Mott was no longer working for Liberty National." That is, while Ms. Williamson testified in her deposition that after she went back to work for Liberty National, Mott continued to call and harass her, she unequivocally admitted that these alleged incidents "happened after Glynn had left Liberty National." Moreover, though she sought and was granted leave to file an amended complaint to clarify, her amended complaint alleges only that

Mott's harassment continued "until shortly before her reinstatement in July, 1994." Nevertheless, in an affidavit furnished by Ms. Williamson in response to defendants' summary judgment motion, however, she states for the first time that during the period of Mott's vacation, i.e, (sic) between the time she returned to work on July 18 and July 29, when Mott's employment ended, he called her several times and told her he was watching her, that he knew her route and that she was "still gonna get it," and that he began following or "stalking" her when she made calls on customers.

The court perceives Ms. Williamson's affidavit, with its blatant contradiction of her sworn deposition testimony, as a transparent attempt to create an issue of fact on the limitations issue and avert summary judgment. The court could, then, simply disregard the referenced portions of her affidavit. However, even were the court to consider the revelations in Ms. Williamson's affidavit, that would not alter the court's conclusion that no actionable conduct by Mott is alleged or shown to have occurred during the relevant time period. That is to say, even were the court to assume that Mott committed the acts described by plaintiff during the time frame identified in her affidavit, those acts, in light of the undisputed facts of record, may not be attributed to Liberty National and cannot, therefore, provide a basis for extending the date of the commencement of the limitations period for plaintiff's EEOC charge. While Mott may still have been technically within Liberty National's employ for a brief period after plaintiff's employment resumed on July 18, 1994, it is readily apparent that during that time, he had no authority whatsoever to perform any act as an

employee of the company. He had already tendered his resignation and for all practical purposes severed his relationship with the company, and was merely "using up" his remaining vacation time. Thus, consistent with Ms. Williamson's deposition testimony, the only reasonable conclusion to be drawn from the facts is that any harassment which Ms. Williamson allegedly incurred at the hands of Mott after April 13, 1995 (sic) happened at a time when either she was not employed by Liberty National or when Mott was not employed by the company.[5]

As an alternative basis for urging a later date than April 13, 1994 for the commencement of the limitations period, plaintiff argues that even without reference to any conduct by Mott, Liberty National committed discriminatory acts within the limitations period. In particular, she argues that Liberty National, through its regional vice president, Newell Cheeseborough, continued to participate in the harassment by conditioning its initial offer of reintatement (sic) with backpay on plaintiff's silence in regard to her allegations of sexual harassment by Mott. In her memorandum, she argues that the company's efforts to "cover up" Mott's harassment was (sic) "nothing short of the company's condonation of Mott's conduct and perpetuation of a hostile work environment." It goes

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[5] These facts also preclude any finding that Mott might himself be held individually accountable under Title VII for his alleged conduct during this time period. Even if he was still employed by the company, he certainly did not hold any supervisory or managerial capacity and no longer had the authority to hire and/or fire anyone. Thus, he could no longer have been considered a Title VII employer.

without saying, of course, that no such allegation, nor anything even remotely resembling such an allegation, appears in Ms. Williamson's EEOC charge, which was filed months after this alleged incident of "harassment," or in her complaint or amended complaint. In any event, however, it simply is not reasonable to contend that Liberty National's having offered the plaintiff reinstatement with back pay conditioned on her execution of a confidentiality agreement amounted to harassment, or condonation of harassment within the contemplation of Title VII.[6] Moreover, when plaintiff declined that offer, Liberty National immediately offered her *unconditional* reinstatement. For these reasons, this conduct by Liberty National does not provide a basis for concluding that the date on which the limitations period began to run was other than April 13, 1994.

Plaintiff next argues that even if the April 13, 1994 incident was the last act of discrimination, there exists a continuing practice by Liberty National of condoning a hostile work environment and tolerating quid pro quo conduct which precludes the dismissal of her Title VII claim. Specifically, she asserts that both before and during her employment with Liberty National, the company had no stated policy against sexual harassment and in fact, had a tendency to look the other way when incidents of harassment were brought to its supervisors' attention.

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[6] Interestingly, when plaintiff's counsel subsequently extended an offer of settlement of Ms. Williamson's claims on July 21, 1994, he advised Liberty National that he would recommend to his client a "confidential settlement of all claims." Presumably, then, plaintiff's own attorney was willing to join in the alleged cover-up.

She maintains that this attitude of tolerance, if not outright condonation, persisted into the limitations period, as specifically evidenced by the company's failure to take effective remedial action when it learned of her complaints about Mott's conduct. And she contends that this "policy" of allowing sexual harassment constitutes a "continuing violation" of Title VII. Plaintiff's position is without merit.

As an initial matter, it is observed that in her EEOC charge, plaintiff made no contention of a continuing violation. The form included a box to check in the event the charging party alleged a continuing violation; and plaintiff, who was represented by counsel, did not check that box.

Furthermore, plaintiff acknowledges that in order for her charge to be considered timely under a continuing violation theory, she must identify at least one act of harassment that occurred during the limitations period, to which previous, related conduct may be tied. *See Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989) (there must be at least one timely incident within the 180-day period of limitations). But what she apparently fails to comprehend is that for the continuing violation theory to apply, not only must there have been an incident within the 180 days preceding her charge, but she must have filed a timely charge with respect to such incident. *See id.* Otherwise, there is no timely charge to anchor the other, prior incidents that would otherwise be time-barred.

Even were this no impediment to the allowance of plaintiff's claims, though, plaintiff's failure to adduce

evidence to substantiate her assertion of a company policy of allowing sexual harassment *that continued into the limitations period* dooms her reliance on the continuing violation theory. Plaintiff suggests that Liberty National's "policy" of condoning harassment continued into the limitations period because the company failed to take effective remedial action against Mott upon being apprised of plaintiff's allegations. But as is discussed at length *supra*, when Liberty National became aware of plaintiff's claims respecting Mott, he had already been removed from his management position and was thereafter advised that if he remained with the company, he would never again hold such a position of authority. Further, when plaintiff insisted that she would not work with Mott, the company offered Mott the option to transfer to its Laurel office, away from the Meridian district office and away from plaintiff, or to resign.[7] Mott chose to resign and communicated that choice to Liberty National *before the plaintiff ever returned to work*. In light of Mott's resignation and the severance of his employment relationship with the company, there was no further remedial action for the company to take against him.

In a final attempt to salvage her Title VII claim and avert summary judgment, Ms. Williamson argues that

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[7] It is noted that Cheeseborough testified by deposition that Mott was not definitely offered another position in Laurel or anywhere else but was advised that depending on the outcome of its investigation of Ms. Williamson's allegations, there was the possibility that he could be transfered (sic) to a nonsupervisory position at another Liberty National location. Plaintiff has not offered evidence that would refute Cheeseborough's testimony.

defendants are equitably estopped from asserting a limitations defense or, alternatively, that this court may equitably toll the running of the limitations period, since her late filing of her EEOC charge is directly attributable to settlement negotiations between the parties which were commenced at the instance of Liberty National. She asserts that by letter dated July 14, 1994, Liberty National asked that she enter into settlement negotiations, following which she responded on July 21, 1994, through counsel, offering to settle her claims for $52,000. She submits that when it became apparent to her that Liberty National was "stonewalling" the settlement process, she proceeded with her EEOC filing by faxing a copy of her charge to the EEOC on October 12, 1994.

Clearly a plaintiff may raise equitable estoppel and/or equitable tolling to extend the period for filing an administrative charge with the EEOC. *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982); *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876 (5th Cir. 1991). However, equitable estoppel may arise to extend the period of limitations only if there has been some intentional or affirmative act of deception that misled the plaintiff into not filing her charge in a timely manner. *See Oshiver v. Levin, Fishbein, Sedrun & Burman*, 38 F.3d 1380 (3d Cir. 1994); *Burrell v. City Univ. of New York*, 894 F.Supp. 750 (S.D.N.Y. 1995); *Williams v. Whirlpool Corp.*, No. 85-2144, 1986 WL 9784 (W.D. Ark. June 27, 1986) (absent fraudulent or misleading conduct by defendant in context of settlement negotiations, time spent in such negotiations did not toll time for filing age discrimination charge with EEOC); *see also Rhodes*, 927 F.2d at 878. In the case at bar, there is no evidence whatsoever that Liberty National at any time

engaged in any conduct that would or could have misled plaintiff into delaying the filing of her EEOC charge. In fact, plaintiff's suggestion that Liberty National initiated settlement negotiations with her is belied by the record. Her attorney first wrote to Liberty National asking if the company wished to engage in good faith settlement negotiations. In response to the company's expression of an interest, plaintiff, through her attorney, extended a request for settlement. And while plaintiff refers in her memorandum to Liberty National's "stonewalling," it is apparent that the Company did nothing more nor less than simply fail to respond to plaintiff's offer for a period of time. Indeed, plaintiff's true position appears to be that the company simply did nothing in response to her July 21 settlement overture, as there is no proof or allegation that plaintiff in any way actively pursued settlement negotiations between the time of that original offer and the filing of her EEOC charge, or proof that Liberty National did anything other than remain silent.[8] This is hardly the kind of "affirmative," misleading conduct that would warrant invocation of the doctrine of equitable estoppel. Nor does it justify equitable tolling by the court, particularly in light of the fact that plaintiff was represented by counsel throughout this period of time. *See Edwards v. Kaiser Aluminum and Chem Sales, Inc.*, 515 F.2d 1195, 1197 (5th Cir. 1975) ("retention of an attorney

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[8] Further, the existence of such alleged "negotiations" certainly does not explain why plaintiff's attorney, who undoubtedly was cognizant of his not having received any response from Liberty National since July 21, 1994, waited until October 12, 1994, rather than October 10, 1994, to file his client's EEOC charge.

to pursue legal remedies for wrongs arising out of the discharge well within the 180 day period provided Edwards with ample means of knowledge" of the law).

For all the foregoing reasons, the court concludes that defendants are entitled to summary judgment as to plaintiff Martha Williamson's Title VII charge. Because Ms. Williamson failed to timely file her administrative charge of discrimination with the EEOC, her claim is not cognizable in this forum and will be dismissed.

Count two of the complaint in this cause purports to allege a cause of action under Mississippi law for wrongful discharge. In this count, as in her Title VII count, she alleges that she was wrongfully terminated by Mott because of her refusal to succumb to his sexual advances. As defendants observe and Ms.Williamson does not dispute, her employment with Liberty National was at-will, meaning, of course, that either Ms. Williamson or Liberty National could terminate the employment relationship at any time for a good reason, wrong reason or no reason at all. *Kelly v. Mississippi Valley Gas*, 397 So.2d 874 (Miss. 1981).[9] Plaintiff submits, however, that the Mississippi Supreme Court, consistent with its recent recognition of a "public policy" exception to the at-will employment rule, *see McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So.2d 603 (Miss. 1993), would recognize a claim for wrongful discharge if confronted with the facts here presented since sexual harassment contravenes public policy. However,

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[9] That this was the status of the parties' relationship was confirmed by plaintiff's agency contract, which expressly recited that "[y]our employment may be terminated by you or by the company at any time."

the public policy exception which the Mississippi Supreme Court has adopted is quite "narrow," holding that "(1) An employee who refuses to participate in an illegal act . . . shall not be barred . . . from bringing an action in tort for damages against his employer; [and] (2) an employee who is discharged for reporting illegal acts of his employer to the employer or anyone else is not barred . . . from bringing an action . . . against his employer." *Id.* at 607. The wrongful discharge claim attempted to be advanced by Ms. Williamson in the case *sub judice* does not fall within the narrow exception enunciated in *McArn*, and the court perceives no basis under the Mississippi authorities for predicting any extension of this public policy exception to encompass claims such as plaintiff's.[10] Accordingly, her wrongful discharge claim will be dismissed.[11]

The same facts alleged in counts one and two of plaintiff's complaint are cited in count three as supportive of claims for intentional and/or negligent infliction of emotional distress by both defendants. As to the claim of *negligent* infliction of emotional distress, defendants

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[10] Indeed, this seems particularly unlikely given that a claim of wrongful discharge predicated on alleged sexual harassment is largely redundant of a federal claim under Title VII. In other words, though Title VII is attended by administrative prerequisites, a plaintiff charging sexual harassment *does have an available remedy*, thus negating any special need to create a remedy under state law.

[11] Defendants have also advanced a res judicata argument for dismissal of plaintiff's wrongful discharge claim, premised on *Hood v. Mississippi Department of Wildlife Conservation*, 571 So.2d 263 (Miss. 1990). The court need not reach this argument.

argue and plaintiff does not deny that Mississippi's workers' compensation laws provide the exclusive remedy. That claim will thus be dismissed.

As the basis for dismissal of plaintiff's *intentional* infliction of emotional distress claim, defendants rely on the one-year statute of limitations prescribed by Miss. Code Ann. § 15-1-35. They argue that this claim is time-barred since plaintiff's complaint, which was filed June 19, 1995, fails to identify any conduct occuring (sic) past June 19, 1994 in support of this claim. Citing *Nichols v. Tri-State Brick and Supply Co.*, 608 So.2d 324 (Miss. 1992), plaintiff denies that the one-year statute of limitations applies and submits, instead, that the subject claim is governed by the state's three-year limitations period provided at Miss. Code Ann. § 15-1-49. While this issue is not free from doubt, the court concludes, for the reasons expressed by the Fifth Circuit in *Guthrie v. J.C. Penney Co., Inc.*, 803 F.2d 202 (5th Cir. 1986), that the one-year statute bars count three of Ms. Williamson's complaint. More particularly, the court considers in this case, as it did in *Guthrie*, that the plaintiff's claim of intentional infliction of emotional distress, based on her allegations of sexual harassment, is properly likened to, or encompassed by the tort of menace covered by § 15-1-35.

In so concluding, the court rejects plaintiff's argument that actions taken by Liberty National and Mott after June 19, 1994 which caused her emotional distress, survive defendants' motion. She has not alleged in her complaint or amended complaint any conduct by Liberty National, *or attributable to Liberty National*, beyond the date of her termination of April 13, 1994 which might

legitimately support a claim for the intentional infliction of emotional distress.[12]

Now, as regards Mott, plaintiff does allege in count six of her complaint a claim for "outrageous conduct" alleged to have occurred following her return to work in July 1994. These claims *against Mott*, having occured (sic) during the limitations period, do survive the present motion.

Plaintiff's fifth cause of action against defendants, for "liable[sic]/slander/defamation," is premised on her allegation that Mott and Liberty National's general counsel, Jim Poole, published slanderous allegations regarding Ms. Williamson's reportedly having bragged around the office of having an affair with a Liberty National employee named "Tommy Woods." Plaintiff complains that such statements were patently false, as she did not even know a Tommy Woods; that they were falsely reported by Mott to Liberty National's home office in retaliation for her having exposed him as a sexual harasser; and that Liberty National, without any investigation, included these allegations in her "LIBERTY'S file initiated by MARTHA'S sexual harassment complaints against Mott."

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[12] The only conduct referenced in her submissions to the court which she asserts as a basis for this claim is Cheeseborough's conditional offer of reinstatement. Just as this conduct would not support a charge of sexual harassment, as a matter of law it will not support liability for intentional infliction of emotional distress.

Plaintiff's defamation claim against Liberty National is fatally deficient in that she has not alleged in her complaint that Liberty National "published" these false allegations by Mott, for publication of the allegedly false statements is essential to any claim for defamation. *See Prosser and Keeton on Torts* § 113 (5th ed. 1984) ("It is essential to tort liability for either libel or slander that the defamation be communicated to someone other than the person defamed."). Thus, her complaint/amended complaint fails to state a claim against Liberty National upon which relief can be granted. But even were the court to overlook plaintiff's pleading omission and consider her evidence pertaining to this claim, it would still conclude that the claim is due to be dismissed, for she still has not come forward with any proof of an actionable publication. On this subject, Ms. Williamson explained in her deposition testimony that she and her husband went to her attorney's office at a time when her attorney was expecting a telephone call from Mr. Poole in reference to Ms. Williamson's case. Plaintiff testified that during that telephone conversation, Mr. Poole told Mr. Smith, her attorney, "that Mr. Mott told him that I had – that one of the employees, Tom Woods, told him that I was sexually harassing him and bragging about having sex with him in the office and bragging about telling my husband about having sex with other men. And it was devastating to me and my husband." Liberty National asserts, and correctly so, that Mr. Poole's statements to Mr. Smith, which were overheard by plaintiff and her husband, were absolutely privileged, having been made in the context of settlement negotiations of

the threatened litigation of Ms. Williamson's "case."[13] *See Restatement 2d (Torts)* (sic) §§ 586 and 587.[14]

However, with respect to the defamation claim against Mott, the court is unable to conclude on the record before it that summary judgment is in order. It does appear that Mott's statements to his superiors at Liberty National are accorded a qualified privilege. The court concludes, though, that there exists a genuine issue of fact as to Mott's motivation in making the alleged statements. That is, there is a question of whether he acted maliciously so as to defeat that privilege. *See Garziano v. E.I. DuPont De Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) (citing *Louisiana Corp. v. Renno*, 173 Miss. 609, 157 So. 705 (1934) ("A communication made in good faith and on a subject matter in which the person making it has an interest, or in reference to which he has a duty, is privileged if made to a person or persons having a corresponding interest or duty, even though it contains matter which without this privilege would be slanderous, provided the statement is made without malice and in good faith.")

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[13] In any event, the statements would be inadmissible under Rule 408 of the Federal Rules of Evidence.

[14] The court has considered plaintiff's Rule 72(a) "motion to reconsider" the magistrate judge's order granting a protective order as to Liberty National's house counsel, Jim Poole. The court concludes that Judge Nicols' order was neither clearly erroneous nor contrary to law and therefore denies plaintiff's motion.

As Martha Williamson's claims against Liberty National are to be dismissed, so, too, is Wiley Williamson's derivative claim for loss of consortium. To the extent that Ms. Williamson's claims against Mott survive the present motion, so does Mr. Williamson's loss of consortium claim.

Based on the foregoing, it is ordered that the motion of defendants Liberty National and Glynn Mott is granted in part and denied in part as set forth herein. It is further ordered that all outstanding motions are hereby denied as moot.

ORDERED this 25th day of June, 1996.

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE